CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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2

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No. 05-325

IN THE

Supreme Court of the United States

TOM E. HARDEN, ET AL., PETITIONERS

v.

WILLIAM E. "BUSTER" FISHER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE THE NATIONAL FRATERNAL ORDER OF POLICE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Adams v. Williams, 407 U.S. 143, 147 (1972)..... 3, 5

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001)..... 4

Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995)..... 4

Minnesota v. Dickerson, 508 U.S. 366, 372 (1993)..... 3

Nelson v. County of Wright, 162 F.3d 986 (8th Cir. 1998) 4

Pena v. Leombruni, 200 F.3d 1031 (7th Cir. 1999)..... 4

Terry v. Ohio, 392 U.S. 1 (1968)..... 2, 3, 5, 7

Wood v. City of Lakeland, 203 F.3d 1288 (11th Cir. 2000) 4

INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae, the National Fraternal Order of Police, respectfully submits this brief in support of the petition for writ of certiorari to the Sixth Circuit.[1]

Pursuant to Rule 37(2)(a) of the Rules of this Court, the National Fraternal Order of Police ("FOP") submits that it has requested and received consent from Petitioners and Respondent for the filing of this *amicus curiae* brief. Consent by Petitioners and Respondent is attached hereto and accompanies this brief.

The National Fraternal Order of Police (hereinafter referred to as "FOP") was formed in 1917 and currently consists of more than 2,100 lodges across the country and over 321,000 members in the United States. The FOP has become the largest professional police organization in the country. The FOP has formed a tradition of police officers representing police officers with the goal of bettering their profession and those who choose to protect and serve our communities, our states, and our country. The FOP strives to increase the public confidence toward the police to the benefit of the peace and the public.

This case concerns a safety stop conducted by Morrow County, Ohio police officers of an individual believed to be suicidal, who was armed with a high-

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* state that counsel for petitioners participated in the drafting of this brief and made a monetary contribution to the preparation and submission of this brief.

powered rifle and refused to obey officer commands. Rather than applying a reasonable suspicion standard to the stop, the Sixth Circuit held that the officers were required to have probable cause to conduct the stop because the man was suicidal. The standard for police officers to stop an individual believed to pose a threat to himself or others is, and should remain, a reasonable suspicion. This standard should not teeter on whether or not that individual has a questionable mental state or is suicidal.

Amicus Curiae has a substantial interest in supporting the petition for certiorari because the appellate court's decision holding that police officers are required to have probable cause to conduct a search of an armed and suicidal individual who poses a threat to himself or others unreasonably limits the ability of a police officer to protect himself and others. Further, the appellate court's decision conflicts with this Court's ruling in *Terry v. Ohio*, 392 U.S. 1 (1968), and will, if left standing, require police officers to (1) make split-second decisions regarding whether an individual who poses a threat to himself or others is suicidal, and (2) then make a decision as to whether the officer has probable cause as opposed to reasonable suspicion, resulting in profound consequences for the safety of the people of this country. This brief will discuss some of the consequences of creating a heightened standard for police officers stopping individuals who are believed to be suicidal or have a disturbed mental state.

SUMMARY OF THE ARGUMENT

This case, if not corrected by this Court, burdens police officers with a requirement that they apply different standards (reasonable suspicion vs. probable cause) to suspects posing a threat or danger to themselves or others. The standard used is determined by the mental state of the suspect.

The Sixth Circuit's decision requires a police officer, when presented with an individual who is armed and posing a threat to himself or others, to determine whether that person is suffering from a mental health disorder, or, alternatively, is about to engage in criminal conduct. If it is because of the former, the officer must have probable cause to search the individual. If it is the latter, the police officer must have a reasonable suspicion.

This Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968) made it clear that the purpose of allowing a police officer to search an individual for weapons was not merely an interest in investigating crime, but rather, a more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. *Terry v. Ohio*, 392 U.S. at 24. See also *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *Adams v. Williams*, 407 U.S. 143, 147 (1972). It should not matter whether the armed person is suicidal or has a questionable mental state, and to require a police officer to make a split-second determination of such is unreasonable and compromises the safety of the people the police protect.

In addition to the incorrect decision of the Sixth Circuit, the Eighth and Ninth Circuits conclude that the mental state of the individual being detained or arrested is relevant to the reasonableness of a police officer's actions. See *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995); *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001). This creates a serious circuit split, as at least four circuits have held that the mental state of a suspect is irrelevant when considering the reasonableness of a police officer's actions in dealing with an individual who may be armed and do not require a heightened standard of care for officers dealing with suicidal individuals. See *Wood v. City of Lakeland*, 203 F.3d 1288 (11th Cir. 2000); *Pena v. Leombruni*, 200 F.3d 1031 (7th Cir. 1999); *Nelson v. County of Wright*, 162 F.3d 986 (8th Cir. 1998); and *United States v. Wallace*, 889 F.2d 580 (5th Cir. 1989). This split among the circuits is significant and requires that this Court accept this case on writ of certiorari.

The Sixth Circuit has done more than just misapply the facts of the underlying case to the law of this Court; it has changed this Court's law, as outlined in *Terry v. Ohio*, for situations where police officers are making a *Terry* stop of mentally-disturbed individuals. The Sixth Circuit has unreasonably limited the ability of a police officer to protect himself and others, and therefore, its decision should be reversed.

ARGUMENT

I. When Police Officers Receive Specific Information Indicating That A Person Has A Weapon, There Is Justification For A Pat Down Search, Regardless Of The Mental State Of The Individual.

This Court was clear in *Adams v. Williams*, that when a police officer receives specific information indicating that a person has a weapon, there is justification for a pat down search. *Adams v. Williams*, 407 U.S. 143 (1972). An officer is justified in conducting a pat down search regardless of the mental condition of the individual and regardless of whether the individual is believed to be engaged in or about to be engaged in criminal conduct. Indeed, as this Court explained in *Terry*, 392 U.S. at 13, "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to the desire to prosecute for crime." Further, the fact that an officer may not suspect an individual of criminal activity does not render such a seizure unreasonable per se as *Terry* only requires "specific and articulable facts which...reasonably warrant [an] intrusion" into the individual's liberty. *Terry*, 392 U.S. at 21.

The Sixth Circuit made several errors in its decision. First, the Sixth Circuit concluded that the officers did not suspect criminal activity, and therefore, the officers were not justified in conducting a *Terry* stop of an individual armed with a high-powered rifle. Second, the Sixth Circuit concluded that an officer must have probable cause, not a reasonable suspicion, to seize a person believed to pose a danger to himself or

others when that person is believed to be suicidal. This decision significantly alters the law of this Court, as discussed above, in that now police officers are required to make a mental health determination before they are ever able to conduct a stop of a person posing a danger, so that the police officer knows whether or not they must have a reasonable suspicion or a probable cause. This law surely cannot stand, as to require officers to make such difficult split-second decisions unreasonably limits the ability of a police officer to protect himself and others.

A. Danger To Safety Of Police Officers.

Police officers are already required to make difficult split-second decisions in their critically important jobs. Requiring a police officer to determine the mental health of an individual before making a stop, however, is unreasonable and places the police officer's safety in extreme jeopardy. The fact is that the Sixth Circuit's decision gives more protection to the mentally-disturbed, requiring a police officer to have probable cause to stop an armed mentally-disturbed individual, but only reasonable suspicion to stop an armed person without mental instability. Such a rule is nonsensical.

The safety of police officers is a growing concern requiring that the already heavy burden of a police officer's duties not be multiplied by decisions like the Sixth Circuit's. During the years 1994-2003, 616 police officers were feloniously killed. See "Law Enforcement Officers Killed & Assaulted," Printed by Federal Bureau of Investigation, U.S. Department of Justice, Washington, D.C. 20535, page 18 (Nov. 2004). A

staggering 571,358 police officers were assaulted. Id. Of the 616 police officers feloniously killed, 14 were handling mentally deranged assailants. Id. Of the 571,358 police officers assaulted, 9,142 were handling mentally deranged assailants. Id.

With such a huge number of police officers killed and assaulted, and a surprising number of those resulting from the handling of mentally deranged assailants, it is deeply concerning that the Sixth Circuit has issued a decision that offers greater protection to mentally-disturbed individuals than to those without mental health concerns. This Court must reverse the Sixth Circuit to correct this great error.

B. Greater Constitutional Rights To Mentally-Disturbed Individuals.

In the underlying case, police officers arrived in response to a 9-1-1 call of an alleged attempted suicide to find a man sitting in the middle of railroad tracks holding a high-powered rifle. The deputies knew nothing about this man other than he was apparently attempting to commit suicide. The deputies took cover behind their police cruiser and instructed the man over the PA to lay down his rifle. The man ignored the deputies and instead began walking toward the deputies with his rifle in hand. Eventually, after the third or fourth command, the man dropped his rifle but bent down and picked something else up. As the man approached the officers, deputy Steve Alexander saw firearm shells or ammunition protruding from the man's clothes and did not know if the man had another firearm on him. The man, "Buster" Fisher, was taken off the railroad tracks, handcuffed, and told to lay down

for a brief period of time so that the officers could search him for weapons. The man went into cardiac arrest and medical assistance was immediately rendered. This was clearly a legal *Terry* stop, engaged to ensure the safety of police officers and others.

Despite this Court's clear rule in *Adams*, *Terry*, and others, the Sixth Circuit found that the above investigation stop violated the constitution. Even though "Buster" Fisher was armed and ignoring police officer commands, the Sixth Circuit said that because the police officers did not suspect Fisher was engaged in or about to be engaged in a crime, the officers were required to have probable cause to restrain the man because he was suicidal. This law changes existing Supreme Court precedence and requires a heightened burden for officers searching and seizing mentally unstable or suicidal suspects. The result is that mentally unstable individuals are provided a higher level of constitutional protection than those without mental instability. In other words, the general public is less protected from armed and mentally unstable individuals than everyone else. This result is clear error and the Sixth Circuit must be reversed.

The Sixth Circuit has done more than just misapply the facts of the underlying case to the law of this Court; it has changed this Court's law, as outlined in *Terry v. Ohio*, for situations where police officers are making a *Terry* stop of mentally-disturbed individuals. This case will, if left standing, require police officers to (1) make split-second decisions regarding whether an individual who poses a threat to himself or others is suicidal, and (2) then make a decision as to whether the officer has probable cause as opposed to reasonable

suspicion, resulting in profound consequences for the safety of the people of this country. The Sixth Circuit has unreasonably limited the ability of a police officer to protect himself and others, and therefore, its decision should be reversed.